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IN THE

Supreme Court of the United States

OCTOBER TERM 1949.

No. 775.

GENERAL STEEL CASTINGS CORPORATION, *et al.*,
Petitioners,

v.

JOHN S. KROESE.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OCTOBER TERM 1949.

GENERAL STEEL CASTINGS CORPORATION, *et al.*, *Petitioners*,

v.

JOHN S. KROESE.

No. 775.

Brief in Opposition to Petition for Writ of Certiorari.

Question Involved.

Are the members of the Board of Directors, or at least a majority of them, indispensable parties to this class action in which the holder of cumulative preferred stock seeks to compel the declaration and payment of dividend arrears on the ground that they were improperly withheld; in which no claim against any director individually or personally is asserted; and where it affirmatively appears that there is no one State or Federal district in which a majority of the directors reside or can be served with process? And must the action be dismissed because of the inability to bring such majority within the jurisdiction of the Court?

Statement.

The action is by a preferred stockholder to compel the payment of arrears of dividends. On motion, be-

fore answer, the District Court dismissed on the ground that a majority of the directors were indispensable parties and had not been joined. The Court of Appeals, Third Circuit, reversed and the cause was remanded for trial.

The amended and supplemental complaint alleges that three of the directors of defendant are residents of Pennsylvania, four are residents of Illinois, and two are residents of Missouri (R. 3, 8). It also contains the following allegation:

> "There is no one State or Federal District in which a majority of the Board of Directors of General Steel reside and jurisdiction over a majority of such board as to either service of process or venue can be acquired only by their consent or voluntary appearance" (R. 8).

POINT I.

In an action brought solely to enforce the declaration and payment of dividends on preferred stock directors are not indispensable parties.

A.

In such an action, since no claim is made against any director personally, there is no invasion of his individual rights or interests, and, while a proper, he is not an indispensable party.

Indispensable parties have been defined as follows:

> "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affect-

ing the rights of such absent party. 1 Street, Fed. Eq. Pr. §519."

Waterman v. *Canal-Louisiana Bank & Tr. Co.*, 215 U. S. 33, p. 49, 54 Law Ed. 80, p. 86.

"Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

Shields v. *Barrow*, 17 Howard 129, p. 139; 15 Law Ed. 158, P. 160.

Assuming that in the instant case the directors have the discretionary power to declare or withhold the dividends sued for herein, it is difficult to see how they can be injuriously affected by any decree that might be made or how such decree may be inconsistent with equity or good conscience.

The corporation is the principal and the directors merely its agents. Any decree rendered herein can affect the corporation only, and no individual rights of any director. If the directors feel they would like to be heard, they have the privilege of entering an appearance.

Both the Federal and State Courts have frequently entertained similar suits to compel the declaration of dividends without regard to the fact that the members of the Board of Directors had not been joined as defendants. We refer to a few:

St. John v. *The Erie Railway Company*, 89 U. S. 136, 22 Law Ed. 743;

Nickals v. *New York, Lake Erie & W. RR. Co.*, 119 U. S. 296, 30 Law Ed. 363;

Boardman v. *L. S. & Mich. S. Ry. Co.*, 84 N. Y. 157;
Cohn v. *Mishkoff Costlow Co.*, 256 N. Y. 102.

See also

Williams v. *Green Bay & W. RR. Co.*, 326 U. S. 549, 90 Law Ed. 311,

an action to recover interest on income debentures payable out of earnings, and only when declared by the board of directors, and in that respect very similar to the case at bar.

While in the foregoing cases the question of the non-joinder of the Directors does not seem to have been raised, it is significant that they reached the highest appellate courts without jurisdiction being questioned; especially so, when it is borne in mind that the Federal Courts will of their own motion dismiss where jurisdiction is absent.

The rule is expressed in *Mansfield C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 28 Law Ed. 462, 464, where it is held that "on every writ of error on appeal, the first and fundamental question is that of Jurisdiction, first, of this Court, and then of the Court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

We are aware of the recent decision in *Schuckman* v. *Rubinstein*, 6 Cir. (1947), 164 F. (2nd) 952, which affirmed a judgment of dismissal on the ground, among others, that in an action to compel the payments of dividends the directors, or at least a majority of them, are indispensable parties; the argument being that the Court must have such majority before it, in order to be able to compel a declaration of the dividend.

It will be noted that the decision in that case was based on three grounds; lack of diversity, failure to state a cause

of action and lack of jurisdiction. The decision of the District Court had been on the last two grounds. The Circuit Court of Appeals, in affirming, held that the dismissal was proper on all three grounds (p. 955).

Hence, the ruling, that the action was properly dismissed, by reason also of the absence of a majority of the directors, was not essential to sustain the decision of the District Court. The denial of certiorari by this Court, 333 U. S. 875, is susceptible, at most, of an inference that the dismissal of the action was proper.

In *Stevens* v. *U. S. Steel Corporation*, 68 N. J. Eq. 373, 59 A. R. 905, a dividend action, a demurrer to the complaint because of the nonjoinder of the directors, was overruled.

May we respectfully suggest that, even though a majority of the directors were served with process and before the Court, it would be in the power of any of them, no claim being made against them personally, to resign with impunity while the action is pending and before the Court makes its decree; in which event the directors remaining before the Court may form only a minority of the board; and while such action may not be probable, it is entirely possible, and the power of the Court may be frustrated indefinitely. This fact emphasizes the distinction between a case in which directors are sought to be held liable for their personal wrongdoing, where they cannot, by resigning, escape the consequences of their acts, and one in which, as here, there is no charge of any personal liability. Likewise in case of death, the estate would not be liable, and the board may be reduced to a minority.

Moreover, the courts have held that the rule as to indispensable parties, being an equitable rule, will not be applied so as to render the courts impotent or defeat the very ends of justice.

Jarvis v. *Shackelton Inhaler Co.*, 6th Cir., 1943, 1336 F. (2d) 116, at pages 121-122;
Parker Rust-Proof Co., et al. v. *Western Union Telegraph Co., et al.*, 2nd Cir., 1939, 105 F. (2d) 976, at page 979.

B.

An action to compel the payment of dividends is in principle analogous to an action to compel the payment of interest on income bonds, where such interest is payable out of earnings and only when declared by the board of directors.

An action to secure payment of such interest has been held by this Court to be in its nature equivalent to an action for specific performance. There can be no question that directors are not usually joined in and are not indispensable parties to such an action.

In

Williams v. *Green Bay, W. R. R. Co.*, 326 U. S. 549, 90 Law Ed. 311 (1945),

holders of Class B debentures, on which the interest was payable out of earnings and only when declared by resolution of the board, brought their action to enforce payment thereof in the Southern District Court of New York. None of the directors, as heretofore shown, were joined.

The action was dismissed by the District Court on the ground, not material here, of *forum non conveniens*. The Circuit Court of Appeals affirmed. On appeal to this Court, the judgment was reversed.

Circuit Court of Appeals had held that, even though there were net earnings, the directors had discretion to determine whether or not interest should be paid on the Class "B" Debentures (226 U. S. 552).

This Court assumed that the majority of the Court below was right in finding such discretion in the board of directors (552-553); and in speaking of that discretion and the remedy in case of abuse, the Court held that "• • • the customary remedy is comparable to that which a Court of equity affords in a suit for specific performance" (p. 558).

The instant action involves the same discretionary power as that involved in the payment and declaration of interest in the case cited. It is, therefore, entirely comparable to an action for specific performance in which the presence of the directors, or a majority thereof, is not required nor necessary to confer jurisdiction.

If it be claimed that in an action for specific performance the directors, in carrying out the decree of the Court, are to perform a ministerial act only, the answer is that, if the decree in a dividend action finds abuse of discretion and directs that a dividend be declared and paid, the directors are no longer vested with any discretion, but, in obeying the mandate of the Court, are equally charged with a ministerial duty only.

The cases relied upon by petitioner are distinguishable, and are clearly not in point.

Kales v. *Woodworth,* 32 F. 2nd 37 (C. C. A. 6th 1929), held that a dividend received in 1919, pursuant to decree made in 1917, was taxable as income in 1919 when received, and not in 1917, the taxpayer having kept her account on a cash basis.

N. Y. P. A. N. J. Utilities Co. v. *Public Service Commission of New York,* 23 F. Supp. 313 (S. D. N. Y., 1938) was an action to void a restriction against payment of dividends on the common stock pending a rate proceeding. The question in issue here was in no way involved.

Rhoads v. *National Iron Bank of Pottstown,* 35 F. Supp. 650 (E. D. Pa. 1940), was an action seeking the removal of trustees under a trust indenture. The trustees

had not been joined. Held that legal title was in the defendants and the relief requested was to disentitle them (p. 652).

In *Gesell* v. *Tomahawk Land Co.*, 184 Wis. 537, 200 N. W. 550, the Court found as a fact that the directors had not abused their discretion in failing to declare the dividend. The statement in the opinion that the directors should have been joined was, therefore, *obiter dicta.*

POINT II.

To hold that the directors of the corporation in the instant case are indispensable parties would mean a complete denial of justice.

It appears affirmatively that there is no one State or Federal District in which a majority of the directors of the corporate defendant reside or can be served with process.

The Court will take judicial notice of the fact that many of our larger industrial and railroad corporations, whose operations extend over many States, and whose securities are widely held, have directors residing in different jurisdictions. To adopt the rule contended for by defendants would result in a denial of relief to many thousands of stockholders who have invested in those securities. The Courts have in many cases found it proper in dividend actions to correct abuses by the directors and to grant relief. It cannot be that the stockholders of a corporation, whose activities are local and limited and whose directors may be found in one jurisdiction, may have access to the courts, while those holding securities in companies having a wider scope and whose directors are scattered over different States will be denied such access and be remediless. It should not be said that a corporation may frustrate the powers of the courts by electing a board of directors whose members

are so chosen that no process of the courts, as in the instant case, can reach a majority of their number.

Nor should it be overlooked that, even if a majority of the directors may ultimately be found to reside within the jurisdiction of the Court and are served with process, the defenses of the Statute of Limitations and of laches may be available to the corporation and to some of its directors, but not to others, depending upon the duration of their residence in the State; thus creating a paradoxical situation where a majority of the directors may be before the Court but not amenable to its process.

It is respectfully submitted that the petition be denied.

Respectfully submitted,

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